SUPREME COURT
FILED
FEB 8 - 2006
OFFICE OF THE CLERK

No. 05-1020

IN THE

Supreme Court of the United States

THOMAS PALLOTTA,
Petitioner,

v.

JOANNE B. BARNHART
Commissioner of Social Security,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS PALLOTTA
Pro Se
267 13th Street
Palisades Park, NJ 07650
(201) 947-5864

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

This case presents the following question concerning review of Administrative Agency due process procedures.

Should Military Veterans who have served this country honorably be given the same constitutionally guaranteed due process prehearing procedural rights applicable to the processing of disability claims as are normally given to SSA employees and counsel for SSA?

PARTIES TO THE PROCEEDING

Thomas Pallotta

Joanne B. Barnhart
Commissioner of Social Security

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	10
REMAND IS APPROPRIATE	16
CONCLUSION	18
APPENDICES	
Appendix A—Opinion of the United States Court of Appeals for the Third Circuit	1a
Appendix B—District Court Order and agency orders below	7a
Appendix C—Order of the United States Court of Appeals for the Third Circuit denying rehearing en banc	19a
Appendix D—Judgment of the Court of Appeals of the Third Circuit	20a
Appendix E—Regulatory and Statutory provisions	22a
Appendix F—Other material the petitioner believes essential to understand the petition plus excerpts from four acknowledgements of notice of hearing	24a

TABLE OF AUTHORITIES

CASES Page

Allegheny Gen. Hosp. v. N.L.R.B., 608 F.2d 965 (1979)..... 15
Anderson v. Weinberger, 380 F. Supp. 640 (1974) .. 16
Aversa v. Secretary, 672 F. Supp. 775 (1987)..... 5, 14
Bauzo v. Bowen, 803 F.2d 917 (1986).....4, 6, 14
Boddie v. Connecticut, 91 S. Ct. 780 (1971)...3, 6, 11, 17
Brown v. Sullivan, 932 F.2d 1243 (1991)..... 5, 14
Butland v. Bowen, 673 F. Supp. 638 (1987)..... 10, 12
Califano v. Sanders, 97 S. Ct. 980 (1977)..... 10, 13
Call v. Heckler, 647 F. Supp. 560 (1986)..... 14
Christopher v. Secretary, 702 F. Supp 41 (1989).. 10
Cleaton v. Secretary, 815 F.2d 295 (1987)..... 5, 14
Dealy v. Heckler, 616 F. Supp. 880 (1984)...4, 6, 10, 11, 12
Ferreira v. United States, 389 F.2d 191 (1968) 9, 12
Giacone v. Schweiker, 656 F.2d 1238 (1981)..... 10
Goldberg v. Kelly, 90 S.Ct. 1011 (1970)..... 12
Gonzalez v. Sullivan, 914 F.2d 1197 (1990)..... 12
Hammond Packing Co. v. Arkansas, 29 S. Ct. 370 (1909).....11, 17, 18
Howard v. Heckler, 661 F. Supp. 654 (1986)..... 14
International T. and T. Corp. v. Local 134, Int. Bro. of Elec. W., 95 S. Ct. 600 (1975)..... 12
Lody v. Secretary, 451 F. 2d 871 (1971)..... 9, 10
Mathews v. Eldridge, 96 S. Ct. 893 (1976) 2, 13
McGowen v. Harris, 666 F.2d 60 (1981) 5
Mercer v. Birchman, 700 F.2d 828 (1983).....3, 6, 7, 11
Mullane v. Central Hanover Bank and Trust Co., 70 S. Ct. 652 (1950).....7, 9, 13
Natural Resources Defense Council v. EPA, 822 F.2d 104 (1987) 15
Parris v. Heckler, 733 F.2d 324 (1984).....4, 6, 14
Puckett v. Chater, 100 F.3d 730 (1996) 3, 6, 11
Richardson v. Perales, 91 S. Ct. 1420 (1971)...2, 3, 6, 12

TABLE OF AUTHORITIES—Continued

Page

Scott v. Heckler, 768 F.2d 172 (1985) 14
Shin v. Sullivan, 915 F.2d 1186 (1990) 7, 9, 13
Sims v. Apfel, 120 S. Ct. 2080 (2000) 13, 14
Trepina v. Wood, 227 F. Supp. 726 (1964) 9, 12
Ventura v. Shalala, 55 F.3d 900 (1995) 2, 6, 11, 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 1
42 U.S.C. § 405(g) 1, 10
S. Ct. R. 10 ..... 1, 17

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Third Circuit (August 18, 2005), is reprinted at Petitioner's Appendix (Pet. App.) 1a to 6a. Rehearing *en banc* was denied on November 10, 2005, reprinted at Pet. App. 19a. District Court order (July 19, 2004), is reprinted at Pet. App. 7a to 11a. The third order of dismissal from Newark ALJ Office (August 4, 2003), is reprinted at Pet. App. 12a to 13a. The official opinion and action of appeals council which is the Commissioner's final decision, i.e., final disposition (Feb. 27, 2004), is reprinted at Pet. App. 14a to 15a. The official final disposition notice from the commissioner that refers to the prior official opinion and action of the appeals council (as of: 05/18/2004), is reprinted at Pet. App. 16a. The appeals council order vacating the prior final disposition notice (March 29, 2004), is reprinted at Pet. App. 17a to 18a.

BASIS FOR JURISDICTION

This court has jurisdiction under 42 U.S.C. § 405(g) and court rule 10. An order denying petitioner's request for rehearing en banc was issued on November 10, 2005, Pet. App. 19a, and the court's mandate was issued on November 18, 2005. 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

20 CFR 404.970, is reprinted at Pet. App. 22a.

42 U.S.C. 405(g), is reprinted at Pet. App. 23a.

STATEMENT OF THE CASE

This document is a constitutional due process procedural claim. In 1983 the Social Security Administration (SSA) wrongfully denied disability benefits. Erroneous deprivation of such property rights is occurring due to SSA refusal to stop

engaging in procedural default. *Mathews v. Eldridge*, 96 S. Ct. 893, 903 (1976).

SSA is claiming that Petitioner did not present a constitutional due process procedural claim that would give the courts subject matter jurisdiction. Petitioner raised the due process violations detailed below before SSA, the District Court, and Appeals Court. Therefore these issues have been preserved for appeal. When constitutional due process rights are violated the courts must remand to the agency for a full and fair evidentiary hearing.

In 1996 Petitioner filed a application to reopen a 1983 disability claim. Pet. App. 24a to 27a. Opposing counsel asserted that the application was denied both initially and upon reconsideration on the grounds of *res judicata*. It is noted that defendant asserts that a July 30, 1993 reconsideration determination is the final merits determination for the 1983 claim.

It is also noted for the record that Petitioner had never before been given a first time full and fair evidentiary hearing, nor any hearing of any kind. Due process requires that any hearing afforded claimant be full and fair. *Ventura v. Shalala*, 55 F. Rep. 3d 900, 902 (1995); *Richardson v. Perales*, 91 S. Ct. 1420 at 1427-28 (1971).

Petitioner infers these laws of case doctrine are referring to first time hearings following reconsideration denials. Fair means due process procedural fairness, procedural safeguards, procedural hearing rights protection. August 26, 1998 Notice of Hearing. Pet. App. 28a to 32a. ALJ offers a full evidentiary hearing. This offer of a full evidentiary hearing is allowed when prior disability claims are reopened. Therefore the 1983 claim was reopened. If 1983 claim was not reopened then ALJ would not offer petitioner a full evidentiary hearing. This notice of hearing is the same kind of notice that all claimants receive following a reconsideration denial.

Following a reconsideration denial a hearing must be full and fair. The ALJ hearing is a *de novo* review. The precedent set in *Richardson v. Perales*, 91 S. Ct. 1420 (1971) is instructive, binding, and final. There is no discretion for independent judgment from SSA and the lower reviewing courts. Accordingly petitioner must be given a full and fair evidentiary hearing following the 1996 reconsideration denial once the ALJ mailed the notice of hearing to petitioner.

September 15, 1998 acknowledgment of Notice of Hearing, Pet. App. 33a to 34a. Petitioner filed a written notice to request due process procedural right to review file and make copies of documents in file on a day before the scheduled hearing to prepare for the hearing. ALJ has a open file policy to view and copy evidence in file before hearing. *Puckett v. Chater*, 100 F. Rep. 3d 730, 731 (1996). This law of case doctrine is referring to due process hearing procedural rights and is instructive. This procedural right had been previously allowed in 1993 to take place at Hackensack SSA District Office where the file is kept. In 1998 this ALJ denied this due process hearing procedural right. That denial is procedural default. *Boddie v. Connecticut*, 91 S. Ct. 780, 781, 786 (1971). On account of that procedural default petitioner refused to participate in the evidentiary hearing. *Mercer v. Birchman*, 700 F. Rep. 2d 828, 829, 830 (1983).

In this second circuit legal service representatives will not participate in hearings that are in procedural default. This pro se petitioner takes the same position. Procedural default makes it difficult to properly defend a disability claim because petitioner is denied the right to prehearing disclosure of proposed exhibits, and right to make copies of exhibits.

April 12, 1999, the same ALJ mails petitioner a second notice of hearing. Pet. App. 35a to 39a. Same offer of a evidentiary hearing.

April 16, 1999 acknowledgment of Notice of Hearing. Pet. App. 40a to 42a. Petitioner filed a second written notice requesting due process hearing procedural rights. Procedural fairness is the law of the land. Same ALJ again denied this written notice. That denial is again procedural default. Petitioner again for good cause reason refused to participate at hearing. See Applicable cases above. Petitioner would not cave in to procedural default. This caused ALJ to dismiss hearing request and to conclude that the prior claim can not be reopened, and he also invoked *res judicata* on the prior final denial of benefits. SSA repeatedly defended *res judicata* and the reviewing courts affirmed.

It is noted for the record that SSA may not invoke *res judicata* on the prior 1993 final determination because there was no prior hearing, *i.e.*, no prior adjudication that would allow invoking *res judicata*. *Dealy v. Heckler*, 616 F. Supp. 880, 888 (1984). This ALJ two times reopened 1983 claim by offering petitioner two first time full evidentiary hearings, but when petitioner refused to cave in to procedural default, this ALJ in his dismissal purported to refuse reopening.

On account of procedural default and error of law petitioner filed for appeals council review of ALJ dismissal. Petitioner gave appeals council new and material evidence showing continuity and severity of combined medical impairments present since filing 1983 disability application. Appeals council vacated, overturned and reversed ALJ's actions, findings, conclusions, pursuant to broad violation of 404.970 Criteria. *Parris v. Heckler*, 733 F. Rep. 2d 324, 326 (1984); *Bauzo v. Bowen*, 803 F. Rep. 2d 917, 920 (1986). SSA Reg. 404.970 is reprinted at Pet. App. 22a. Reversal means that the ALJ denial to reopen 1983 claim was reversed by appeals council to a granting of reopening of 1983 claim. Broad violation of 404.970 criteria involved ALJ abuse of discretion, ALJ engaged in error of law, actions, findings and conclusions of ALJ are not supported with substantial

evidence, there is a procedural issue involvement which for petitioner means ALJ violation of constitutionally protected due process hearing procedural rights. It is noted for the record that when new and material evidence is furnished to appeals council that based on SSA regulations, this is good cause reason for reopening. Petitioner met this criteria for reopening because appeals council invoked broad violation of 404.970 criteria.

This court knows that reopening entitled petitioner to a *de novo* full and fair evidentiary hearing, bars *res judicata*, effects a final decision so that the courts have subject matter jurisdiction to remand back to SSA, if agency error occurs, so SSA can correct all of its own errors. This is true when no prior hearing was held.

Aversa v. Secretary, 672 F. Supp. 775 (1987); *Brown v. Sullivan*, 932 F. 2d 1243 (1991); *Cleaton v. Secretary*, 815 F. Rep 2d 295. 404.970 review is a de novo review by appeals council, so that the entire record must be evaluated, which therefore must include evaluation of all the merits. If a subsequent disability claim has been reconsidered on the merits to any extent and at any administrative level, then the claim has been reopened.

McGowen v. Harris, 666 F. Rep. 2d 60, 61 (1981). 404.970 review is not a threshold inquiry. Therefore because all the merits in petitioner's file were evaluated by appeals council pursuant to 404.970 review petitioner must now be given a full and fair evidentiary hearing.

In addition, because appeals council remanded for a hearing, due process requires that any first hearing afforded petitioner must be full and fair. See applicable cases above.

April 26, 2001, Notice of Hearing. Pet. App. 43a to 47a. A second ALJ officer using same kind of Notice of Hearing offers petitioner another evidentiary hearing.

April 30, 2001, Acknowledgment of Receipt (Notice of Hearing). Pet. App. 48a to 50a. This written notice again requests due process prehearing procedural rights. *Puckett v. Chater*, 100 F. Rep. 3d 730, 731 (1996). Again this law of case doctrine is detailing constitutionally guaranteed due process prehearing procedural rights. This second ALJ again commits procedural default by denying the procedural request. He again dismissed hearing request and again denied reopening in violation of prior appeals council reversal of last ALJ refusal to reopen, and again in violation of *Dealy v. Heckler*, 616 F. Supp. 880 888 (1984) invokes *res judicata* where no prior hearing (adjudication) had ever occurred. On account of same procedural default petitioner refused to participate at hearing. *Mercer v. Birchman*, 700 F. 2d 828-830 (1983). Petitioner filed a second application with appeals council to review ALJ dismissal. Petitioner again furnished appeals council with new and material evidence showing continuity and severity of medical impairments present since filing 1983 claim.

Appeals council again vacates, overturns, and reverses ALJ actions, findings, and conclusions pursuant to broad violation of 404.970 criteria. Pet. App. 22a. *Parris v. Heckler*, 753 F. Rep. 2d 324, 326 (1984); *Bauzo v. Bowen*, 803 F. Rep. 2d 917, 920 (1986). Again due process requires that any first time hearing afforded to claimants must be full and fair. *Ventura v. Shalala*, 55 F. Rep. 3d 900, 902 (1995); *Richardson v. Perales*, 91 S. Ct. 1420 at 1427-28 (1971). A third ALJ schedules another hearing for July 18, 2003. On July 10, 2003 Petitioner files for the fourth time a acknowledgment of receipt (Notice of Hearing). Pet. App. 51a to 53a. Petitioner again in writing requested prehearing due process procedural hearing rights, to prepare for scheduled hearing. This third ALJ again committed procedural default by denying Petitioner's written request for procedural fairness. This procedural default again violates *Boddie v. Connecticut*, 91 S. Ct. 780, 781, 786 (1971).